

the death of William Spencer, still these complainants have no right to interpose the plea, because by the will creating a trust in Isaac Spencer to pay the debts of the testator, he, and he alone, had authority to plead it.

In the cases referred to by the complainants' counsel, the plea was put in by the trustees charged with the payment of the debts, and I incline to think, if waived by them, it cannot be relied upon by others. In *Burke vs. Jones*, 2 *Ves. & Bea.*, 278, the implication is very strong that in a will creating a trust for the payment of debts, the discretion in regard to the payment is given to the executor of the testator, and that upon the executor alone the power is conferred to rely upon the defence of limitations. The language of the Vice-Chancellor is, "the executor is not directed expressly to plead the statute, nor is there any implication of such intention, but it is to take the ordinary course; his debts are to be discharged, *but the investigation of them is left to the executor*, under the direction of the courts of law and equity." Again: "the plain line is that the testator intends the courts of law and equity to determine what are just debts, *leaving his executor at liberty to use all means of resistance prescribed or allowed by the law.*" *Ibid.*, 290, 291.

Looking to the language of this will, I am of opinion that the testator designed to confer upon Isaac Spencer a discretion which allowed him to pay such debts as he might deem honest, and that it is not competent for these complainants, not only without the consent of the trustee and executor, but in opposition to a claim due him, to rely upon this defence.

The case of *Sheriff vs. Wilson*, decided by the Court of Appeals, at December term, 1841, is, in some respects, very much like the present, and may, I think, be regarded as sanctioning the doctrine that when a trust is created by a will for the payments of debts, the trustee is the only party who can put in this plea. Under such circumstances, the trustee must be regarded as the person whom the testator selects for the protection of his entire estate, real and personal, and with reference to both as standing in the relation which an executor stands to the personal estate.